**MARC X. CARLOS**
California Bar No. 132987
**BARDSLEY & CARLOS, LLP**
424 F. Street, Suite A
San Diego, California 92101
Telephone: (619) 702-3226
Facsimile: (619) 702-5415

Attorneys for **JANET FORBES**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

**(HONORABLE LARRY A. BURNS)**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>JANET FORBES,<br><br>Defendant. | CASE NO. 07CR2956-LAB<br><br>STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S *MOTIONS IN LIMINE* |

**I.**

**STATEMENT OF THE CASE**

In the instant case, defendant JANET FORBES (hereinafter "Ms. FORBES") is charged in an indictment with violating 21 U.S.C. §§ 952 and 960, Importation of Marijuana, and 21 U.S.C. § 841(a)(1), possession with intent to distribute, and 18 U.S.C. § 2, aiding and abetting.

Ms. FORBES has entered a plea of "not guilty" to the charges.

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## II.

## STATEMENT OF FACTS

On September 23, 2007, at approximately 10:20 p.m., defendants Stephen Rhett and Janice Forbes entered into the Unitied States at the San Ysidro port of entry. Rhett was the driver and FORBES was the passenger of 1999 Ford pick up bearing California license plates (3QOS602) which was also towing a trailer. At primary inspection Rhett made a negative declarations to Customs officers regarding items being brought into the United States. Upon further inspection of the trailer, agents noted a floor discrepancy and removed the plywood floorboard. At secondary inspection, agents removed one concealed package which field tested presumptively for marijuana. A total of 108 packages were removed from the trailer which weighed approximately 508.10 kilograms (1117.82 lbs).

In his post arrest interview, Rhett indicated that he had been approached by individuals who claimed to be from a church who offered him $100 dollars each way to transport building materials to Tijuana, Mexico. Rhett drove the vehicle into Mexico the night before his arrest and met with "Jen", the woman he had met from the church, and her friend, "Silivia". The next day, Rhett met with "Felipe", who claimed to be Jen's father. Felipe offered him $2000 dollars to transport illegal aliens into the United States.

In a post arrest interview Ms. FORBES stated that she was unemployed and a transient in San Diego for the past four years. She further indicates that she is on methadone for her heroine addiction and travels into Tijuana for methadone treatment. It was there that she was approached by a man named "Felipe" who offered her $500 dollars to be a passenger in a car transporting illegal aliens. FORBES was driven by a taxi to a home in Tijuana where she met codefendant Rhett and other individuals. FORBES drove with Rhett and another unknown individual to another location to pick up the truck and trailer. FORBES was seated in the passenger seat when the vehicle was detained at the border. FORBES denied any knowledge of marijuana in the vehicle

## III.

## THE COURT SHOULD EXCLUDE ANY PROPOSED EXPERT TESTIMONY

### A. Absent Compliance with Rule 16 and its Discovery Obligations, the Government's Experts Should Be Excluded.

To date, counsel for Ms. FORBES has not been advised by government counsel whether they intend to offer any expert testimony. In the event that such notice is given at a later date, Ms. FORBES objects to any expert testimony as irrelevant and overly prejudicial. Fed. R. Evid. 403; 704(b). In addition, Ms. FORBES requests full compliance with Fed. R. Crim. P. 16 and discovery of the basis of the purported expert's opinions. United States v. Zanfordino, 833 F. Supp. 429, 432-33 (S.D. N.Y. 1993); Fed. R. Crim. P. 16, Fed. R. Evid. 612 and 705; 18 U.S.C. § 3500. He also seeks a pre-trial hearing under Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999).

### B. This Court Should Exclude the Government's Experts Unless It Discloses the Basis of Its Expert's Opinions.

In the event that government counsel proposes expert testimony, Ms. FORBES requests that the Court exclude any expert testimony unless the basis of the expert's opinion is fully disclosed. In Zanfordino, the defense requested discovery regarding the basis of the expert's testimony. The district court granted the request, noting that a cross examination conducted without that information implicated due process and the Confrontation Clause. 833 F. Supp. 429, 432-433. "If an expert is testifying based in part on undisclosed sources of information, cross-examination vouchsafed by that Clause would be unduly restricted." Id. In addition to the constitutional concerns, Zanfordino also relied, as does Ms. FORBES, on Rule 16, Jencks and Fed. R. Evid. 705. Id. at 432-33.[1] Rule 16 requires disclosure of "the bases and reasons for [the expert's] opinions." Fed. R. Crim. P. 16(a)(1)(E). The Rules of Evidence impose a similar requirement: "[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination." Fed. R. Evid. 705. As the Zanfordino court observed, "delaying such disclosure until [cross examination] would merely prolong the trial." 833 F.Supp. at 433. Information relied upon by an expert is clearly Jencks material, particularly when the information takes the form of reports written or adopted by the expert. See 18 U.S.C. § 3500(a), (e)(1); see also Fed. R. Civ. P. 26(b)(4) (adversary may obtain information to be relied upon by the expert).

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[1] The government may argue that the amount of material it is obligated to produce might be large. Even so, the fact that the material may be voluminous is not a basis for declining to order the necessary disclosure. See United States v. Roark, 924 F.2d 1426, 1430-32 (8th Cir. 1991); United States v. Allen, 798 F.2d 985, 1000 (7th Cir. 1986).

Here, if an expert is called, it is clear he or she intends to rely upon materials not yet produced to the defense, including reports and various reference materials. All of this information must be produced. Generally speaking, the government's typical expert "disclosure" is no more than a generalized invocation of its witnesses' experience. The actual sources of information are not produced to the defense. "If an expert is testifying based in part on undisclosed sources of information, cross-examination vouchsafed by [the Confrontation] Clause would be unduly restricted." Zanfordino, 833 F. Supp. at 432. Ms. FORBES' right to confront and cross examine the witnesses, guaranteed by the Sixth Amendment and effectuated by the discovery rules, will not merely be "unduly restricted" absent disclosure of the bases of the opinions, it will be eviscerated. Because trial is fast approaching, and no discovery has been provided, the experts should be excluded.[2]

## C. This Court Should Conduct A Pre-Trial Hearing To Determine the Admissibility of Any Expert Testimony.

Ms. FORBES requests a Kumho hearing on the qualifications and relevance of any expert's proposed testimony. There is no doubt that "some of Daubert's questions can help to evaluate the reliability of even experience-based testimony." Kumho, 526 U.S. at 151 (citing Daubert v. Merrel Dow Pharmaceuticals, 509 U.S. 579 (1993)). Moreover, the Ninth Circuit has recognized that Daubert is equally applicable to non-scientific expert testimony, even though the four Daubert factors need not be present in every case. United States v. Hankey, 203 F.3d 1160, 1168-69 and n.7 (9th Cir. 2000) (citing Skidmore v. Precision Printing and Packaging, Inc., 188 F.3d 606, 618 (5th Cir. 1999)); but see Kumho, 526 U.S. at 159 ("the failure to apply one or another of [the Daubert factors] may be unreasonable, and hence an abuse of discretion") (Scalia, J., concurring). Thus, any suggestion that some standard other than Daubert applies is erroneous.

## IV.

## THE COURT SHOULD PROVIDE MS. FORBES' COUNSEL WITH THE OPPORTUNITY TO *VOIR DIRE* THE PROSPECTIVE JURORS

Pursuant to Rule 24(a), Federal Rules of Criminal Procedure, to provide effective assistance of counsel and to exercise Ms. FORBES' right to trial by an impartial jury, defense counsel requests the opportunity to personally *voir dire* the prospective members of the jury.

The Sixth Amendment guarantees the right of an accused to be tried before an "impartial" jury. One of the avenues chosen to ensure the selection of a fair and impartial jury is our system of juror challenges. The right to challenges for cause and peremptory challenges is firmly embedded in our Federal System and the systems of each state. See Edmonton v. Leesville Concrete Co., 500 U.S. 614, 621 (1991). However, "[p]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes." United States v. Ledee, 549 F.2d 990, 993 (5th Cir. 1977). Robust voir dire is an absolutely critical means of revealing important facts:

> If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions . . . both unnecessary and unwise . . . *Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently. See, e.g., Nebraska Press Assn v. Stuart, 427 U.S. 539, 602 (1976) (Brennan, J., concurring in the judgment) (*voir dire* "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause"); United States v. Whitt, 718 F.2d 1494, 1497 (CA 10 1983) ("Without an adequate foundation [laid by *voir dire*], counsel cannot exercise sensitive and intelligent peremptory challenges").

J.E.B. v. Alabama, 114 S. Ct. 1419, 1429 (1994).

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[2] The government must identify when or where any of its proposed experts have testified.

Counsel is better able than the court to develop the *voir dire* questions that are relevant to the particular case and more sensitive as to which answers may need follow-up inquiry. In addition, non-verbal communication between the attorneys and prospective jurors -- including the use of body language in response to particular questions -- can also be a telling sign of bias during attorney-conducted *voir dire* that is itself important information to exercise challenges intelligently. See United States v. Ible, 630 F.2d 389, 395 (5th Cir. 1980) (questioning by counsel is more effective than inquiry by court).

Here, there is ample reason to permit counsel to question prospective jurors. Counsel has a right to determine whether prospective jurors will be able to deliberate fairly and with open minds in a case like this one.

The process will probably involve adaptation of questions in the middle of the inquiry, with genuine exchanges with prospective jurors rather than a mere recital of prepared questions. In other words, this sensitive inquiry is not the sort that lends itself well to a submission of proposed *voir dire* for the Court to use. Because of the particular risks of prejudice that Ms. FORBES faces, and pursuant to Fed. R. Crim. P. 24(a), counsel asks that *voir dire* be conducted by counsel, under equal time limits as imposed by the Court.

## V.

## THE COURT SHOULD NOT SEND THE INDICTMENT INTO THE JURY ROOM DURING DELIBERATIONS

In the commentary to Model instruction 3.2.1, "Charge Against Defendant Not Evidence," the Committee on Model Jury Instructions, in the Ninth Circuit Manual of Model Jury Instructions, strongly recommends that the Indictment not be sent into the jury room during deliberations. The commentary observed that neither the Federal Rules of Criminal Procedure nor case law require sending a copy of the indictment to the jury room because the indictment is not evidence.

Ms. FORBES urges this Court to follow the Committee's guidance. The language in the instant

Indictment "tracks" the language of the charged statutes. Accordingly, it is likely that jurors will be persuaded by the similarities alleged in the Indictment returned by the grand jury and the elements which must be proven in the charged statutes. Ms. FORBES further asserts that sending the Indictment into the jury room allows the prosecutor to usurp the Court's role of instructing the jury on what law applies in the case. Should the Court allow a copy of the indictment to be sent to the jury room, Ms. FORBES requests that the Court redact the indictment and caution the jury that the indictment is not evidence. See United States v. Utz 886 F.2d 1148, 1151-1152 (9th Cir. 1989) (when judge cautions jury that indictment is not evidence, it is permissible to provide each juror with a copy of the indictment).

## VI.

## THE COURT SHOULD BAR THE GOVERNMENT FROM INTRODUCING EVIDENCE OF OTHER CRIMES UNDER FED. R. EVID. 609

Ms. FORBES is requesting that this court exclude evidence of previous convictions. Specifically, Ms. Forbes seeks to exclude a conviction for California Penal Code section 647(A) (soliciting an act of prostitution) in 1992, a conviction for aiding an abetting an illegal entry in 1993, and a conviction for California Health and Safety Code section 11377 in 1985. It is clear that significant time has passed since she suffered these convictions. All of these convictions are highly prejudicial and certainly not probative on any relevant fact. On balance the court should exclude evidence of the convictions as being unduly prejudicial under Federal Rule of Evidence 403.

## VII.

## THE COURT SHOULD ALLOW JOINDER IN CODEFENDANTS MOTIONS

Ms. FORBES requests leave of court to join in codefendant's in limine motions to prohibit street value testimony, exclude evidence of structure, preclude marijuana from the courtroom, order production of supplemental reports and TECS and to compel the government to establish chain of custody. These motions are consistent with the theory of Ms. FORBES' defense.

## CONCLUSION

For the foregoing reasons, the defendant respectfully requests that this Court grant these motions.

Respectfully submitted,

Dated: December 26, 2007

/s/Marc X. Carlos
**MARC X. CARLOS**
Bardsley & Carlos, LLP
Attorney for JANET FORBES
mxlos@aol.com